John Morrell and Company *and* Local 539, United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 7-CA-19349

25 November 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 11 February 1983 Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief with cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

AMENDED CONCLUSIONS OF LAW

Insert the following as paragraph 3 and renumber the subsequent following paragraphs.

"3. The Union is now and at all times material herein has been the exclusive bargaining representative of the employees of the Respondent for the purpose of collective bargaining within the meaning of Section 9(a) of the Act in the following appropriate unit:

> "All salesmen employed by John Morrell and Company in the State of Michigan, but excluding guards and supervisors as defined in the Act, and all other employees."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, John Morrell and Company, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reduce to writing and execute the collective-bargaining agreement reached between it and the Union as of 15 April 1981, or in any other manner refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All salesmen employed by John Morrell and Company in the State of Michigan, but excluding guards and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reduce to writing and duly execute the collective-bargaining agreement ratified by the Union on 15 April 1981.

(b) Give retroactive effect to the collective-bargaining agreement referred to above, and reimburse employees for any increased wages or benefits owed thereunder as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977), and pay into employee benefit funds any additional amount as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in the State of Michigan copies of the attached notice marked "Appendix." [1] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Local 539, United Food and Commercial Workers International Union, AFL-CIO, CLC, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All salesmen employed by John Morrell and Company in the State of Michigan, but excluding guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reduce to writing and execute the collective-bargaining agreement reached between John Morrell and Company and Local 539, United Food and Commercial Workers International Union, AFL-CIO, CLC, ratified on 15 April 1981, and shall make this agreement retroactive to that date, and WE WILL reimburse employees for any increased wages or benefits owed thereunder, plus interest.

JOHN MORRELL AND COMPANY

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: On May 27, 1981, Local 539, United Food and Commercial Workers International Union, AFL-CIO-CLC (the Union), filed a charge against John Morrell and Company (the Respondent). The complaint issued on July 1, 1981, alleging that the Respondent has violated the Act by refusing to execute a collective-bargaining agreement negotiated between the parties and ratified by the Union and that the Respondent has failed and refused and continues to fail and refuse to bargain in good faith with the Union by insisting on further negotiations before execution of the collective-bargaining agreement. The hearing was held before me on these matters in Detroit, Michigan, on June 21, 1982. Briefs were received from the General Counsel and the Respondent.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a corporation maintaining its principal office and place of business in Chicago, Illinois, and at this and other installations throughout the United States engaged in the wholesale packing, sale, and distribution of meats and related products. During the fiscal year ending December 31, 1980, a representative period of its operations, the Respondent, in the course and conduct of its business, caused to be transported meat and other goods and materials valued in excess of $100,000 which were transported and delivered to various points located in the State of Michigan directly from points located outside the State of Michigan. I find that the Respondent is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction of this case.

II. THE LABOR ORGANIZATION INVOLVED

Local 539, United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

On July 10, 1980, the Union was certified as the collective-bargaining representative of certain employees of the Respondent, with four employees in the bargaining unit. In September 1980, the Union and the Respondent began negotiations over an initial collective-bargaining agreement. Bargaining sessions for the first contract were held September 18, October 15, November 7, and December 9, 1980. Present at all bargaining sessions were Harry Gramer and Paul Butrum for the Union and Darryl Howe and Victor Mason for the Respondent.

At the first meeting, the Respondent introduced a format for bargaining, insisting that the parties not begin discussion of economic issues until the contract language was resolved. The Union agreed to this format. At the second bargaining session in October 1980 the parties discussed language issues utilizing, in part, contracts between the Union and other companies. There is a slight disagreement as to what occurred at the next two meetings. The Union's position is that the Company deliver a portion of its position on language in writing at the November meeting and the remainder of its position at the December meeting. The Company's position is that it de-

livered its entire position, with respect to language, at the December meeting. As the meetings took place almost a year and a half prior to hearing, this slight discrepancy does not appear to me to be material. It is undisputed that at the December meeting there was on the table a complete draft of the Company's proposed language. The Union's reprsentative testified that at the December meeting the Union agreed to certain of the Company's proposal and modified certain others, utilizing language taken from two other contracts it had with other employers. Introduced as General Counsel's Exhibit 4 is a copy of the Company's proposal used at the December meeting on which there has been placed both handwritten notes and xerox copies of language taken from the other two contracts. It is the Union's position that the notes and the xerox sections represents the totality of the agreed upon language.

On this point, the negotiator for the Respondent testified that though he had not seen General Counsel's Exhibit 4 before the hearing, the Company had, in fact, agreed to some of the Union additions shown on the exhibit. He also agreed that some of the additions came from one of the two contracts from which language was being discussed at the meeting. He did not agree, however, that the Union and the Respondent were in agreement on each provision in the language portion of the contract.

In any event, when the parties left the December meeting, it was agreed that the Respondent would send an economic proposal to the Union. Howe did so on January 8, 1981. With the economic proposal Howe sent a copy of a memorandum of agreement to Gramer. A cover letter accompanied the document saying, "upon ratification of the agreement, we will incorporte the language and type the new 1981-1984 contract for distribution."

Gramer held a meeting with the bargaining unit employees to ratify the agreement on January 13, 1981. Because an insufficient number of employees were present to ratify the contract, the attending employees only discussed the terms of the agreement. These employees requested several changes in the contract and Gramer agreed to contact the Respondent about those changes.

Gramer attempted to contact Howe but instead was referred to E. T. Steadman, corporate director for labor relations for the Respondent around March 1, 1981. On March 13, Gramer met with Steadman to present the employee counterproposals and was requested by Stepman to put the requested changes in writing. Gramer complied with this request on March 15, 1981.

On March 27, 1981, Gramer received a letter from the Respondent which rejected the new union proposals, but was silent about the outstanding offer. Gramer then called another employee ratification meeting in early April 1981. At that meeting, Gramer reviewed the entire contract with the employees including the economic portion and the language portion represented by General Counsel's Exhibit 4. On April 14, 1981, on behalf of the Union, Gramer signed the memorandum of agreement, already signed by Howe on behalf of the Respondent. The following day he mailed a signed document back to the Respondent, advising the Respondent of the membership ratification.

Steadman responded in writing on April 20, 1981, stating that the contract needed clarification because of the counterproposals made in early 1981. By letter dated May 7, 1981, Stepman informed Gramer that it was the Company's that notification of the memorandum of agreement did not consumate final agreement. Gramer further stated that the parties had failed to solve noneconomic issues as pertaining to recognition, jurisdiction, and structure of the bargaining unit. This was the first notice given to the Union by the Respondent of specific issues which remained unresolved.

On May 11, the Respondent returned to the Union the dues-checkoff cards that the Union had forwarded to the Respondent. This letter also reiterated the Company's position that final agreement had not been reached on a contract.

B. *Anyalsis and Conclusions*

Based on the facts of record, I disagree with the Respondent's position. It is clear from the evidence that as of the time the Respondent sent to the Union the memorandum of agreement relating to the economic package, it considered that either a complete proposal had been made, or one that was complete enough for ratification. Had the bargaining unit immediately ratified the memorandum and returned it to the Respondent, there clearly would have been a valid agreement ready for reduction to final writing and signature. See *H. J. Heinz v. NLRB*, 311 U.S. 514 (1941); *Georgia Kraft Co.*, 258 NLRB 908 (1981); *Worrell Newspapers*, 232 NLRB 402 (1977).

Thus, the only question remaining is whether events occurring after receipt of the memorandum of agreement and ratification on April 14, 1981, acted to effectively withdraw the offer. I think not.

In a recent case of *Pepsi-Cola Bottling Co.*, 251 NLRB 187, 189 (1980), the Board stated:

> . . . a complete package proposal made on behalf of either party remains viable, and upon acceptance *in toto* must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by any event upon which the offer was expressly made contingent at a time prior to acceptance. . . .

In *Pepsi-Cola*, the union rejected an employer offer several times and made counterproposals but eventually accepted the employer offer. The Board viewed this acceptance as consumating an agreement and found that the employer's refusal to execute the contract to be in violation of Section 8(a)(5). The General Counsel urges that circumstances in *Pepsi-Cola*, are similar to those in the instant case and that no significant differences exist to warrant a different result. The Respondent, citing the court of appeals treatment of the same case takes the position that several factors rendered the memorandum of agreement of January no longer viable at the date of ratification.

First, the Respondent urges that the Union's counterproposals of March 15, raising a new issue, invalidated

the offer. I find that it is significant and controlling that the Respondent, in rejecting the counteroffer, did not withdraw its outstanding offer or propose to renegotiate based on the counterproposal. Thus, I find this defense without merit and there is nothing to indicate as of the date of the rejection of the counterproposals that the Respondent still intended for its January offer in to be open and subject to ratification.

The Respondent further asserts that as of the date of ratification the Company's offer was not viable because too much time had elapsed between January 8, and the Union's acceptance on April 15. The Board has held in previous cases that acceptance of an outstanding offer must be made within a reasonable time of the offer. Board cases relied on by the Respondent show the Board has approved acceptance in cases ranging from 2 weeks to 2 months. I find nothing unreasonable about the 14-week period involved in this proceeding considering the circumstances. The Union's first attempt at ratification was not effective because of an insufficient number of employees present for ratification. Shortly, thereafter, the Union informed the Respondent of changes the employees present at the first meeting wished to make in the offer. At a meeting held with the Respondent's representative on March 13, 1982, the Union was advised to put the request to changes in writing and the Union replied in the form of a counteroffer. On March 27, the new proposals were rejected and the Union immediately called another ratification meeting at which the membership accepted the offer. Had the Respondent considered the lapse of time between January 9 and the date of the rejection of the counterproposals significant, it could have withdrawn the offer for that reason or because of the counterproposals or for any other reason at that time. It did not do so.

Lastly, the Respondent urges that there are certain ambiguities, omissions, and unclear language contained in the proposal of January 9, which would render it impossible to have that document (G.C. Exh. 4) executed as a contract. The Respondent identifies such problems areas to be in the seniority article, hours of work article, pension, and insurance benefits, and the issue of the status of the "G" salesmen. The Respondent did not consider these issues unresolved as of the date of the January 9 memorandum of agreement and presumably they were matters that would have been ironed out at the time the contract was reduced to final writing for signature.

I find from the evidence that the Company made a viable proposal on January 9, 1981, which was ratified by the Union on April 15, 1981. On April 15, 1981, the parties had an agreement which is susceptible to being reduced to writing and signed. That the Company, thereafter, refused to do so and continues to refuse to sign constitutes a refusal to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

On the basis of the above findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. John Morrell and Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 539, United Food and Commercial Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to execute the agreement reached between the parties and ratified by the Union on April 15, 1981, the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and from, in any like or related manner, infringing upon its employees' Section 7 rights and take certain affirmative actions it has been found will effectuate the policies of the Act. I have found that the Respondent unlawfully refused and continues to refuse to execute a written contract involving the terms of the collective-bargaining agreement ratified by the Union on April 15, 1981. I shall, therefore, recommend that it be ordered to reduce the agreement ratified on April 15, 1981, to writing and execute such by signing. The agreement will be retroactive to that date and the Respondent shall reimburse employees for any increased wages or benefits owed thereunder.

[Recommended Order omitted from publication.]